



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 25, 2018

Ms. Roberta Reardon
Commissioner
Department of Labor
State Office Campus
Building 12, Room 500
Albany, NY 12240

Re: Report 2016-BSE1-02

Dear Commissioner Reardon:

Our Office examined¹ overpayments and related penalties recorded by the New York State Department of Labor (NYDOL) during the period October 1, 2013 through September 22, 2016 that resulted from claimants' willful misrepresentations to obtain unemployment insurance (UI) benefits. NYDOL recorded 168,479 overpayments resulting from willful misrepresentations totaling more than \$211 million, along with more than \$36 million in related penalties during this period. Our examination reviewed 8,522 of those cases totaling more than \$22 million in overpayments and \$3 million in penalties. The objective of our examination was to determine whether NYDOL properly assessed penalties in accordance with law.

A. Results of Examination

We found NYDOL did not consistently assess penalties in accordance with law and/or NYDOL procedures resulting in the failure to assess up to \$311,775 in penalties—more than 10 percent of the penalty amount we examined. This includes up to 1,679 penalties valued at \$307,753 that were not assessed at all and up to 71 penalties valued at \$4,022 that were under-assessed by NYDOL. In addition, NYDOL staff recorded 6,405 overpayments incorrectly, but these recording errors did not affect the penalty amount. We found these errors were caused by either NYDOL officials providing staff with unwritten agency policy that was contrary to law, or staff not following established procedures.

NYDOL officials implemented an unwritten policy not to impose penalties in cases where NYDOL had the information to establish an overpayment determination prior to October 2013, but had not

¹ We performed our examination in accordance with the State Comptroller's authority set forth in Article V, Section 1 of the State Constitution, as well as Article II, Section 8(1) and (7), and Article VII, Section 111 of the State Finance Law and Article 18, Section 550 of the State Labor Law.

made a final determination until after that date due to a backlog. However, the unwritten policy implemented in 2013 does not comply with Federal and State law. New York State Labor Law § 594 and 42 United States Code § 503 require that at the time the State establishes (e.g., makes a final determination) that a claimant has received an overpayment resulting from a willful misrepresentation, a penalty shall be imposed on the claimant.

Further, NYDOL officials explained that staff did not always follow procedures, as written, because some of the procedures contained errors, did not address all possible overpayment circumstances, and prescribed inefficient methods for recording overpayments. Clear and accurate procedures provide the cornerstone of effective oversight and reduce inaccuracies in penalty calculations. In addition, while not expressly set forth in NYDOL's written procedures, NYDOL officials have an expectation that supervisors will review a sample of overpayments for accuracy. We question the effectiveness of the unwritten expectation given that nearly 96 percent of the 8,522 overpayments we examined contained errors either in penalty calculation or recording and were not in accordance with NYDOL procedures.

We found the majority of errors related to recording of information and not the calculation of penalties. While these errors did not affect the amount of the penalties, proper recording is nonetheless essential, especially in light of federal reporting requirements. For example, the US Department of Labor (USDOL) uses states' UI data to calculate economic statistics, allocate administrative funding, measure states' performance, and account for fund use. USDOL requires states to validate UI data by verifying that counts and records are accurate and correctly classified within acceptable error rates.

In response to our findings, NYDOL officials updated overpayment procedures to correct inaccuracies and add clarity, and agreed to provide staff with refresher training. Officials did not indicate whether they would address the incorrect data in the system.

B. Background and Methodology

UI benefits are temporary income for eligible workers who become unemployed through no fault of their own. An overpayment occurs when a claimant receives benefits in excess of the amount entitled. Overpayments are considered willful when claimants knowingly misrepresent information to obtain UI benefits. NYDOL's website states willful overpayments drive up UI costs to law-abiding businesses and leave honest workers unprotected.

To perform our examination, we reviewed State and Federal laws, rules and regulations, and NYDOL policies and procedures; examined NYDOL overpayment records; and interviewed appropriate staff.

We provided NYDOL with the findings of our examination in December 2017 for their review. Officials reviewed 257 (3 percent) of our findings, including both incorrectly calculated penalties and improperly recorded overpayments. NYDOL indicated they disagreed with our assessment in 101 of those cases and believe some of the findings of our examination are incorrect. However, NYDOL did not provide information in sufficient detail or with adequate support for our Office to validate NYDOL's assessment. In addition, we found that the information NYDOL officials provided on their assessment did not include all records NYDOL reviewed, and contained incorrect dollar amounts and duplicate records. Accordingly, we have no appropriate basis to adjust the findings at this time.

Recommendations

- 1) *Assess the proper penalty amount for the 1,679 in non-assessed and 71 under-assessed penalties identified in this report.*
- 2) *Review, as appropriate, the 159,957 overpayments our auditors did not examine to ensure accuracy of the assessed penalties and data. Adjust the penalties and data as necessary.*
- 3) *Periodically review, update and document NYDOL policies and procedures for accuracy, clarity and consistency with State and Federal laws.*
- 4) *Timely communicate NYDOL policies and procedures and related updates to staff.*
- 5) *Ensure appropriate supervisory oversight of staff to confirm compliance with NYDOL policies and procedures.*

We thank the management and staff of the Department of Labor for the courtesies and cooperation extended to our auditors. We would appreciate your response to this report by October 25, 2018, indicating any further actions planned to address the recommendations in this report.

Sincerely,

Bernard J. McHugh
Director of State Expenditures

Encl: Attachment A
Attachment B

cc: Michael Vaccaro, Director of Internal Audit
Diane Taylor, Director of Special Programs & Central Support
Wendy Luft, Associate Auditor

Roberta Reardon
Commissioner
Department of Labor

New York State Department of Labor
Harriman State Office Campus
Building 12, Room 500, Albany, NY 12240
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August 17, 2018

Mr. Bernard J. McHugh
Director of State Expenditures
Office of the State Comptroller
110 State Street
Albany, NY 12236

Dear Mr. McHugh:

This is in response to your letter dated June 18, 2018, regarding Draft Report 2016-BSE1-02. Your draft report summarized the findings from your office's examination of Unemployment Insurance (UI) benefit overpayments and related penalties during the period from October 1, 2013 through September 22, 2016. Your report notes that you reviewed 8,522 cases totaling \$22 million in overpayments and \$3 million in penalties of which 1,750 cases had penalties under or not assessed totaling \$311,775.

The Department notes the following in relation to the examination and your report:

- The examination commenced four years ago by letter dated July 21, 2014.
- The examination was conducted by the Bureau of State Expenditures, which is not charged with performing this type of audit. The Division of State Government Accountability has the tools and experience to ensure compliance with the Generally Accepted Government Auditing Standards (GAGAS)
- As to scale, the overall impact identified amounts to less than .8% of all benefit overpayment cases and .004% of the total UI benefits processed by the Department.
- As to accuracy, the Department's review of a sample of your findings reveals inaccuracies in 39% of these findings.
- We made outreach in both February and March 2018 to discuss the above inaccuracies. While our position appears to have been accepted, it is observed that the June 18, 2018 report was not modified.

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Comment 1

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Comment 2

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Comment 3

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Comment 4

We appreciate your Bureau's work in its daily analysis of UI payment files and UI quarterly records. Our ongoing partnership in addressing any concerns raised by your Bureau has resulted in two years of very positive reports. You have concluded that the work the Department has done greatly lowered

the number of improper payments between 2013 and 2016, which covers the same audit time frame as this examination. Additionally, and as a result of this particular examination, the Department instituted a number of improvements including procedure changes and mainframe programming.

Moving forward, DOL suggests that programmatic reviews deliver the greatest public benefit when those examinations are based upon improving future operations, involving matters capable of repetition, and are otherwise designed and performed to deliver the public's return on investment. Against these principles of public accountability, DOL remains committed to partner with your staff in furtherance of the important end of improving operational effectiveness and efficiencies for the benefit of all New Yorkers.

Recommendations and Responses:

Below are the Comptroller's recommendations and the Department's responses:

Comptroller's Recommendation

1. Assess the proper penalty amount for the 1,679 in non-assessed and 71 under-assessed penalties identified in this report.

Department's Response

The Department will review those cases that have not already been redetermined, appealed, or otherwise become final under the law.

Comptroller's Recommendation

2. Review, as appropriate, the 159,957 overpayments our auditors did not examine to ensure accuracy of the penalties and data. Adjust the penalties and data as necessary.

Department's Response

The Department will allocate resources commensurate to the issue. Any case reviewed will be subject to Labor Law section 597.

Comptroller's Recommendations

3. Periodically review, update and document NYSDOL procedures for accuracy, clarity and consistency with State and Federal laws.
4. Timely communicate NYSDOL procedures and related updates to staff.
5. Ensure appropriate supervisory oversight of staff to confirm compliance with NYSDOL policies and procedures.

Department's Response

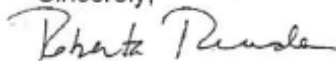
The Department has dedicated procedure, training, and quality assurance units which, among other things, are specifically assigned to accomplish the following:

- regularly update procedures and policies;
- engage training and retaining efforts to minimize human error and increase quality and accuracy;
- conduct both federally required and supervisory quality reviews and uses findings to improve processes and correct errors; and
- work to update and improve systems. In fact, and to assist staff in determining the correct penalty codes, help-text was added to the overpayment entry screen earlier this year. This change required programming to the Department's mainframe computer system.

As noted above, the Department made several specific procedural and system improvements as a result of this examination.

If you have any comments, please contact Stephen Geskey, Director Unemployment Insurance Division at (518) 457-2878.

Sincerely,



Roberta Reardon

Cc: Mario Musolino
Mary Batch
Stephen Geskey
James Konicki
Michael Vaccaro

State Comptroller's Office Comments on Auditee Response

1. While our Office initially engaged this examination on July 21, 2014, NYDOL objected to the examination being conducted by our staff assigned to the daily audit of UI payments. To address NYDOL's concerns, we delayed the examination until staff not involved in the daily audit were available. Our Office reengaged this examination on July 5, 2016, 24 months after the initial engagement.
2. The constitutional and statutory authority to audit is vested in the Office of the State Comptroller and not in any particular Bureau. There is no legal requirement that the present examination be conducted in accordance with the Generally Accepted Government Auditing Standards. However, all the Comptroller's auditors, including those in State Expenditures, are experienced and use tools and techniques consistent with the Standards.
3. NYDOL's description of the scale of our findings as less than 0.8 percent of all benefit overpayment cases is not an appropriate measure of the impact of this examination. The \$311,775 in penalties NYDOL failed to assess represents more than 10 percent of the \$3 million in penalties we examined. By its nature, the dollar values identified in a sample represent a small portion of the value within the population. The value of errors in the full population could far exceed \$311,775. Moreover, we found penalty calculation or recording errors in nearly 96% of cases we examined, which raises serious questions about the process controls in place.
4. The Standards require our auditors to evaluate whether NYDOL's information is correct because it is in conflict with our findings. NYDOL reported to have reviewed 257 of the 8,522 claims we examined and disagreed with our findings in 101 of those cases. Consistent with the Standards, our auditors requested NYDOL provide the sufficient, appropriate evidence used to draw their conclusions. The evidence NYDOL provided in February 2018 was incomplete, contained incorrect dollar amounts and duplicate records. NYDOL declined our subsequent request to provide sufficient, appropriate evidence. Accordingly, our auditors are unable to accept NYDOL's position.